The First Amendment Out On Highway 61: Bob Dylan, RLUIPA, and the Problem with Emerging Postmodern Religion Clauses Jurisprudence

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Postmodern thought is increasingly displacing Modernism as the prevalent worldview, which is having a profound affect on America's legal institutions. It is unrealistic to expect that present day interpretation of the Constitution, a document written in an era under the sway of Modernity—which is antithetical to Postmodernity—would not result in extreme instances of dissonance, inconsistency, and near incomprehensibility. Accordingly, it is becoming increasingly necessary, and even urgent, to critically assess the implications of the changes inherent in the general societal shift to Postmodern thought to ensure that a coherent and functional system of law will result. Nowhere is the tension between these competing worldviews more apparent than in religion clause jurisprudence as the two philosophies are diametrically opposed in their understanding of the role and source of religion. This Note uses Cutter v. Wilkinson, *a Sixth Circuit Case pending review by the United States Supreme Court, to illustrate the disarray into which First Amendment religion jurisprudence will fall, or has already fallen, as a result of Postmodern thought controlling interpretation of the decidedly Modern religion clauses. Specifically, Postmodern assumptions regarding religion are incompatible with the underlying justification for the religion clauses and application of these assumptions have resulted a marked weakening of free exercise guarantees. The* Cutter *case represents an important opportunity for the Court to address these issues and hopefully restore coherency and functionality to religion clauses jurisprudence.*

I. INTRODUCTION

Oh God said to Abraham, "Kill me a son"
Abe says, "Man, you must be puttin' me on"
God say, "No." Abe say, "What?"
God say, "You can do what you want Abe, but
The next time you see me comin' you better run"
Well Abe says, "Where do you want this killin' done?"
God says, "Out on Highway 61."

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Well Mack the Finger said to Louie the King

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I got forty red white and blue shoe strings
And a thousand telephones that don't ring
Do you know where I can get rid of these things
And Louie the King said let me think for a minute son
And he said yes I think it can be easily done
Just take everything down to Highway 61.
-Bob Dylan, Highway 61 Revisited[1]

While the lyrics to Bob Dylan's 1965 song *Highway 61 Revisited* might at first blush appear to be utter nonsense, a thoughtful examination reveals Dylan articulating his vision of a Postmodern world, accentuating the profound impact of Postmodernism on thoughts of religion. Dylan portrays a world where competing ideas and conceptions of ultimate truth were all equal. By juxtaposing the sacrifice of Isaac by Abraham,[2] a foundational event for the three major Western faiths, with a used shoe string salesman hawking useless junk at a roadside flea market, Dylan's *Highway 61 Revisited* was a symbol of religion in the Postmodern world, the place where the transcendent and the mundane are understood as non-distinct.[3] In contrast, the philosophically Modern worldview would have universally and unhesitatingly understood Abraham's sacrifice to be far more significant than the need to unload some slightly used shoestrings. In the four decades since *Highway 61 Revisited* was released, Postmodernism has ascended from artistic experimentation by the avant-garde to a position as the increasingly dominant philosophy of our day, redefining our society's collective way of thinking and challenging institutions that have been built upon Modern intellectual foundations.[4] While penetrating every aspect of our culture in general,

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[1] BOB DYLAN, *Highway 61 Revisited, on* HIGHWAY 61 REVISITED (Columbia Records 1965). Complete lyrics *available at* http://www.bobdylan.com/songs/highway61.html (last visited Sept. 22, 2004).

[2] *See Genesis* 22:1–18.

[3] Highway 61 is an American highway that runs from New Orleans, through Memphis, all the way to Dylan's home state of Minnesota; all places that played a unique and vital role in America's musical heritage (crediting Minnesota with Dylan's success), each with a distinct sound. Dylan's *Highway 61 Revisited* sought to blur the line of demarcation between different styles of music, evidenced by his focus on the road that joined these places instead of the places themselves. As confirmation that such a view is not just gross over interpretation, *Highway 61 Revisited* was recorded over the same summer that Dylan stunned the music world by playing an electric guitar at the Newport Folk Festival. The folk music purists who reveled in the festival received the act with revulsion as the electric guitar was considered a rock instrument, and rock an inferior style of music. Dylan, at the time, was the darling of the folk music world, its newest and brightest star, and the action was calculated to obtain just such a response. Shattering these musical distinctions, equalizing supposedly higher and lower art forms, was just one indication that Postmodernism was on Dylan's mind when he wrote *Highway 61 Revisited.*

[4] I am indebted to HUBERT L. DREYFUS, who in his KIERKEGAARD ON THE INFORMATION HIGHWAY (2000), *available at* http://www.ieor.berkeley.edu/~goldberg/lecs/kierkegaard.html,

as it applies to the law, the shift from Modernism to Postmodernism has created a state of unrest in judicial treatment of the Religion Clauses, which are premised, as much as any other constitutional provisions, upon Modern ideals.

As America entered the Twenty-First Century, the Postmodern ideas on religion represented in *Highway 61 Revisited* were displacing widely held beliefs associated with the worldview of Modernism, particularly the proper societal role and treatment of religion. Rather than being limited to an artistic or religious phenomenon, the emergence of Postmodern thought has already affected American legal institutions and laws, and will continue to become increasingly influential. It is unrealistic to expect that present day interpretations of the Constitution, a document written in an era under the sway of Modernity—which as a general societal philosophy is antithetical to Postmodernity—would not result in extreme instances of dissonance, inconsistency, and near incomprehensibility. Perhaps the unarticulated assumptions about the influence of Postmodern thought that the current Supreme Court justices employ in their role as interpreters are responsible for some of the deep divisions in controversial cases and make it seem, at times, as though the justices argue around each other, each seeming to ignore or fail to comprehend the other. Accordingly, it is becoming increasingly necessary, and even urgent, to critically assess the implications of the changes brought by a general societal shift to Postmodern thought to ensure that a coherent and functional system of law will result.

As Postmodernism is a reaction to and a rejection of Modernity, there are times when Postmodern judicial interpretation will be inconsistent with provisions of the Constitution that are most uniquely a product of Modernity, possibly rendering constitutional jurisprudence dysfunctional. Such dysfunction is particularly acute in the treatment of the Religion Clauses, because the two philosophies are diametrically opposed in their understanding of the role and source of religion. The goal of this Note is to identify where the two systems clash and how their incompatible views on religion have adversely affected religion clause jurisprudence. I will examine this issue by making a case study of *Cutter v. Wilkinson*,[5] a Sixth Circuit case that relies heavily on Postmodern philosophical principles to guide its analysis of whether the Religious Land Use and Institutionalized Persons Act (RLUIPA), a law promoting the free exercise of religion, violates the Establishment Clause. The case is richly illustrative of the difference between Modern and Postmodern assumptions surrounding the First Amendment Religion Clauses, and it is extremely useful for making sense of the disarray into which religion clause jurisprudence has plunged as a result of the competition between the two worldviews. By analyzing *Cutter* and other

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made me consider Dylan and *Highway 61 Revisited* at greater depths. I think however, that it is more appropriate to view *Highway 61 Revisited* as Postmodern rather than nihilistic, as Dreyfus interprets it.

[5] 349 F.3d 257 (6th Cir. 2003).

important influences on the Religion Clauses in light of the shift from Modernity to Postmodernism, this Note will illuminate why the treatment of religious legal issues is increasingly incoherent and how a coherent framework can be reestablished within the Postmodern Age by focusing on and crediting the original Modern justifications for the Religion Clauses.

Part II of this Note gives a brief history of the major shifts in the treatment of the Free Exercise Clause and how Congress came to protect the Free Exercise Clause in place of the Court, ultimately giving rise to religious accommodation acts such as RLUIPA.

Part III presents an explanation of the principles of Modernity and how they were essential to the creation of the Constitution, providing the intellectual foundation and justification for the Religion Clauses. Part III also discusses the emergence of Postmodern philosophy as a reaction to Modernity, focusing specifically on its treatment of religion and identifying ideals and values that are distinctly Postmodern.

Part IV analyzes the Sixth Circuit's treatment of RLUIPA specifically and religion generally in the *Cutter* case as an example of Postmodern judicial philosophy, focusing on its inconsistencies with the Modern justifications for the Religion Clauses.

Part V presents suggestions on how to restore coherency to religion clause jurisprudence in the Postmodern age, namely by recognizing and keeping religious belief uniquely worthy of protection, eliminating the absolute neutrality requirement from Establishment Clause cases, and invoking Equal Protection principles in religion cases.

II. THE SHIFT IN FREE EXERCISE PRINCIPLES AND THE HISTORY OF RLUIPA

A. *Shifting Constitutional Standards:* Smith, *Laws of General Applicability, and the Failure of Court Mandated Exemptions to Protect Free Exercise*

RLUIPA was enacted as part of a continuing attempt by the U.S. Congress to restore the protection accorded religious exercise under the Free Exercise Clause of the First Amendment of the Constitution[6] to the standard used before the landmark *Employment Division v. Smith* decision in 1990.[7] The *Smith* Court required only reasonable basis review in First Amendment Free Exercise

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[6] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

[7] Employment Div. v. Smith, 494 U.S. 872 (1990). *Smith* is sometimes referred to as the "Peyote Case."

challenges to laws of general applicability.[8] By moving away from strict scrutiny review, the decision lowered the protection given under the Free Exercise Clause to groups seeking exemptions to laws that incidentally curbed their religious practices.[9] *Smith* was a watershed case and Congress, perceiving it as a cheapening of constitutional protections of fundamental liberties, has attempted to restore legislatively the higher level of scrutiny rejected by the Court.[10]

The respondents in *Smith* were fired from their private sector jobs at a drug rehabilitation center after they were discovered to have ingested peyote, an unlawful controlled substance under Oregon state law.[11] As members of the Native American Church, the respondents had used peyote ceremonially as a sacrament in keeping with the tenets of their faith.[12] After being terminated by their private employer, the respondents were also denied unemployment compensation by the state as they had been fired for "misconduct," making them ineligible for benefits.[13] The state's denial of unemployment benefits was challenged as a state action, which violated their First Amendment Free Exercise rights.[14]

The Court asserted that the First Amendment guarantees chiefly the "right to believe and profess whatever religious doctrine one desires."[15] While the First Amendment prevents a state from making laws directly aimed at a specific religion, laws that are generally applicable to all people and only curb religious exercise as an incidental effect are permissible so long as a reasonable

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[8] *See id.* at 884–85 (refusing to employ balancing test from *Sherbert v. Verner*, 374 U.S. 398 (1963), which requires the government to have a compelling interest to justify a law that substantially burdens religious practice).

[9] *See, e.g.*, S. REP. NO. 103-111, at 7 (1993) *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 ("The effect of the *Smith* decision has been to hold laws of general applicability that operate to burden religious practices to the lowest level of scrutiny employed by the courts: the 'rational relationship test.'").

[10] *See, e.g.*, Senator Orrin G. Hatch, Religious Liberty at Home and Abroad: Reflections on Protecting this Fundamental Freedom, Keynote Address: International Law and Religions Symposium (Oct. 6, 2000), *in* 2001 BYU L. REV. 413, 424–26 (2001) (explaining that the Court's abandonment of strict scrutiny in free exercise claims was the impetus for trying to restore it legislatively).

[11] *See Smith*, 494 U.S. at 874.

[12] *Id.* The Native American Church has been defined as including "some 100,000 adherents from over 50 North American Indian tribes...loosely unified through sacramental ingestion of the non-narcotic hallucinogenic buds of the peyote plant... in Saturday all-night rites...." THE PENGUIN DICTIONARY OF RELIGIONS (John R. Hinnells ed. 1984).

[13] *Smith*, 494 U.S. at 874.

[14] *See id.*

[15] *Id.* at 877.

justification for the law exists.[16] The *Smith* Court identified *Sherbert* as the origin for the strict scrutiny standard in free exercise claims,[17] but limited the application of that standard to instances where the unemployment laws themselves burdened free exercise.[18] Specifically, the Court rejected the need for the government to demonstrate a compelling interest to justify the incidental burden placed on free exercise of religion created by laws of general applicability, especially in the context of criminal laws.[19] Only when the Free Exercise Clause worked in conjunction with another fundamental right, such as Equal Protection or Free Speech, did the Court indicate it would be willing to consider a religious exemption to reasonable and neutral general laws.[20]

While critics denounced *Smith* as a dramatic departure from the precedent established for reviewing free exercise claims under *Sherbert* and its progeny,[21] the Court insisted that it was following the traditional manner in which these matters were usually dealt, with *Sherbert* being an unusual exception.[22] As an

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[16] *Id.* at 877–78.

[17] *Id.* at 883 (establishing the requirement that state actions "that substantially burden a religious practice must be justified by a compelling governmental interest") (citing *Sherbert*, 374 U.S. at 402–03).

[18] *See id.* at 882–84. While the respondents in *Smith* were denied unemployment benefits by the state, the burden on their free exercise rights came from criminal laws. *Id.* at 884–85. Contrast with *Sherbert*, where the claimant was denied unemployment benefits because she refused to work on Saturday in accordance with the practice of her faith. 374 U.S. at 399–400.

[19] *Smith*, 494 U.S. at 884–85. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself,'—contradicts both constitutional tradition and common sense." *Id.* at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1879)).

[20] *Id.* at 881. Mark Tushnet identifies the Court's willingness to consider an exemption from general laws where two fundamental rights are implicated as the hybrid exception. He is suspicious that, as applied, this idea would not create a religious exception to a generally applicable law, but rather invalidate a law as unconstitutional for violating one of the other rights implicated. *See* Mark V. Tushnet, *Questioning the Value of Accommodating Religion*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 245, 246 (Stephen M. Feldman ed., 2000).

[21] *See, e.g.*, Hatch, *supra* note 10, at 424–25.

[22] *See Smith*, 494 U.S. at 878–79. The Court based its reliance for this proposition on two cases, both of which are arguably misused by the *Smith* Court. *Id.* at 879. The first case, *Minersville School District v. Gobitis*, dealt with an individual's refusal to salute a flag as an act of conscientious objection, and although involving a religious adherent, the act was not considered religiously motivated as a matter of law. 310 U.S. 586, 597–98 (1940). Therefore, the Free Exercise Clause was not considered implicated by that Court. The other case, *Reynolds v. United States*, involved the practice of polygamy among Mormons. 98 U.S. 145, 161 (1879) Arguably, state refusal to accommodate polygamy could be justified by a compelling interest of the state, particularly in 1879. The *Reynolds* case raises the unique problem of refusing to accommodate religion, if, as Tushnet argues, the refusal of the state to accommodate polygamy contributed dramatically to the doctrinal shift of the Latter Day Saints Church to reject

alternative to "courting anarchy"[23] by requiring religious exemptions to general laws through constitutional guarantees, the *Smith* Court suggested that the First Amendment "value" of free exercise should be pursued through legislative efforts.[24] Acknowledging the disadvantaged position that minority and fringe religions would find themselves under such a scheme, the Court still insisted it was a better alternative to making the balancing of religious beliefs against societal interests commonplace in courts across the country.[25]

1. *Objections to* Smith

Many religious communities throughout the United States were troubled by the majority decision in *Smith*.[26] The fear that the decision made religious

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polygamy. *See*, Tushnet, *supra* note 20, at 250. Perhaps the state's influence on religion is justifiable if society has a compelling interest to encourage such a change (e.g., eliminating virgin sacrifice), but for the state to proscribe orthodoxy by proxy in matters great and small without a compelling interest would surely violate principles of separation inherent in the Religion Clauses.

[23] *Smith*, 494 U.S. at 888.

[24] *See id.* at 890 (suggesting that protected values in the Bill of Rights can be promoted by legislation in the political process).

> Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Id.

[25] *See id.* It has been suggested that religious exemption claims are brought primarily by minority religions because the system naturally protects mainstream religious practices. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 128 (First Anchor Books Edition 1994) (1993) ("'[N]ot a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner.'") (quoting Kathleen M. Sullivan, *Religion and Liberal Democaracy*, 59 U. CHI. L. REV. 195, 216 (1992)); *see also, e.g.*, Joseph R. Duncan, Jr., *Privilege, Invisibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States*, 54 ALA. L. REV. 617, 620–21, 625–26 (2003). One of the principal sponsors of legislative efforts to restore strict scrutiny to religious exercise claims invokes the need to protect minority religions from potentially oppressive majoritarian rule. *See* Hatch, *supra* note 10, at 424 (noting the inconsistency between punishing members of the Native American Church for ingestion of peyote, yet not prosecuting Christian churches that provide wine to minors in sacramental ceremonies).

For a challenge to the hypothesis that the "Rehnquist Court's doctrinal innovations will turn subsequent Religion Clause cases against minorities in an unprecedented fashion," see Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 223 (2003).

[26] *See, e.g.*, Hatch, *supra* note 10, at 425 (stating, perhaps understating, that the "abandonment of the strict scrutiny standard resulted in dismay among the religious community."); *see also, e.g.*, S. REP. NO. 103-111, at 8, *reprinted in* 1993 U.S.C.C.A.N. 1892,

freedoms subservient to the whims of majoritarian bodies is understandable, especially if one accepts Stephen L. Carter's description of *Smith* as valid; "The majority scoffed at [their] claim, not so much disbelieving it as disregarding it: the fact that the peyote use had religious significance, the Court said, was irrelevant, as long as the state law was not 'an attempt to regulate religious [belief directly].'"[27]

The remaining members of the Court were likewise dismayed by the shift in religion clause jurisprudence, as expressed in Justice O'Connor's concurrence, which stated that "[the] holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[28] O'Connor rejected the majority's distinction between laws that directly target religion and generally applicable law with only incidental effect on religion, because it allowed the state to do indirectly what it was forbidden to do directly, essentially nullifying the freedom of religion as promised in the First Amendment.[29] By reducing constitutional protection of free exercise rights against generally applicable laws, religious individuals and groups were forced by the Court to seek protection from the benevolence of a legislature.[30] With the legislature serving functionally as a court of last resort it

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1897 (reporting that at a committee hearing representatives of the religious community claimed, "[s]ince *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction").

[27] CARTER, *supra* note 25, at 126 (quoting *Smith*, 494 U.S. at 882).

[28] *Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

[29] *Id.* at 894 (O'Connor, J., concurring) (expressing that most burdens placed on religion are from generally applicable laws, and "[i]f the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice").

[30] *See* CARTER, *supra* note 25, at 129 (critiquing the Court's suggestion that religious accommodation is best worked out through the political process which they concede will disfavor religious minorities: "What Justice Scalia misses is that it was in order to avoid this 'unavoidable consequence of democratic government' that the Free Exercise Clause was crafted in the first place."). This critique echoes the majority in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which most artfully expressed the need to keep fundamental rights above politics fifty years before *Smith*:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles *to be applied by the courts*. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638 (emphasis added). Ironically, the Free Exercise Clause places the greatest restriction on the legislature of all the government branches, requiring that *Congress* not pass any laws prohibiting the free exercise of religion. *See* U.S. CONST. amend I.

was argued, "some religious groups will likely be crushed by the weight of majoritarian law and culture" or be pushed to radicalization.[31]

2. *Scrutiny for Free Exercise Claims of Free Citizens Changed by* Smith *to the Same Standard Used for Inmates*

The ironic and embarrassing truth is that *Smith* made applicable to society at large the same standard used to assess free exercise claims of the men and women in America's correctional facilities. Prior to *Smith*, the Court also rejected strict scrutiny in free exercise claims regarding inmates in *O'Lone v. Estate of Shabazz*.[32] The dispute in *O'Lone* concerned Muslim inmates who wished to observe the Jumu'ah, a weekly congregational service on Fridays after the sun has peaked but before afternoon prayers as mandated by the Koran.[33] Muslim inmates on work detail outside of the prison grounds, who wanted to observe the Jumu'ah, created a logistical problem for prison officials. To bring even one Muslim prisoner back to the prison to attend Jumu'ah would require bringing all prisoners on outside detail back to the prison for safety reasons as required under prison regulations.[34]

The Court rejected strict scrutiny review of government action in free exercise claims in prisons and denied the inmate's First Amendment claims, reasoning that the religious practices of inmates could be burdened by prison rules so long as the rules were "reasonably related to legitimate penological interests."[35] The alternatives of assigning Muslim inmates to inside work duty on Friday, or implementing alternative outside work days were both rejected as being either too difficult to administer or too burdensome on already scarce resources.[36] *Smith* subjected free citizens to the same lower level of review for free exercise claims as incarcerated individuals, effortlessly bridging the chasm between legitimate penological interests and legitimate societal interests.

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[31] CARTER, *supra* note 25, at 129 (arguing that the minimalization of fringe religions can cause radicalization) (quoting Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 690 (1992)).

[32] 482 U.S. 342, 350–52 (1987) (applying the four factor rational relationship test to prison regulations that burdened a prisoner's fundamental rights from *Turner v. Safley*, 482 U.S. 78, 89–90 (1987); 1) assessing the rational relationship between the regulation and the governmental interest, 2) alternative means for prisoner to exercise right, 3) the impact of accommodation, and 4) existence of alternatives to the regulation).

[33] *O'Lone*, 482 U.S. at 345.

[34] *Id.* at 346.

[35] *Id.* at 349–51.

[36] *Id.* at 346–47.

B. *Religious Freedom Restoration Act and* Boerne

In 1993, Congress purportedly acted on the admonition of the *Smith* Court and attempted to restore strict scrutiny for all governmental action in free exercise claims by enacting the Religious Freedom Restoration Act (RFRA).[37] The legislative record indicates that RFRA was motivated by the fact that "facially neutral laws that operated to burden the free exercise of religion were often upheld by the courts," under the *Smith* rationale and this "severely undermined religious observance by many Americans."[38] It is true that the *Smith* Court endorsed seeking accommodation through legislative bodies, however that suggestion implied it would be done on a case-by-case basis rather than an across the board legislative preference for accommodation.[39] RFRA expanded free

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[37] 42 U.S.C. § 2000bb et seq. (1993) (requiring that all governmental actions incidentally burdening religious exercise must be justified by a compelling governmental interest, and be the least restrictive means of achieving that interest). It is illustrative of the robust appreciation for religious liberties in this country that the legislature gave wholesale protection to religious exercise, protecting minority religions and not just politically or historically powerful religious interests. That the Act had fifty-seven cosponsors in the hundred member Senate is also telling of the commitment to religious liberty, or the extent of the fallout from the *Smith* decision. *See* S. REP. NO. 103-111, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893.

[38] S. REP. NO. 103-111, at 5, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1894 (citing testimony from Prof. Douglas Laycock).

[39] *See Smith*, 494 U.S. at 890 (offering state laws in Arizona, New Mexico, and Colorado, which specifically exempted religiously motivated peyote use from general controlled substances statutes, as an example of how legislative accommodation could occur). Although the *Smith* Court said that legislative accommodations would be permitted though not constitutionally required, there is a good chance that the Court's suggestion creates a Catch-22. *Id.* at 890. At first blush, RFRA appears to be a fair and impartial accommodation treating all religions equally, however it failed as being beyond the scope of Congress's enumerated powers. Even if within the scope of Congress's power, some argue that RFRA is unconstitutional because it violates principles of separation of powers by "reversing" the Supreme Court and operates as a back door amendment to the Constitution. *See* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2–7 (1998). Then, as Justice Stevens suggests, even if RFRA was completely within the scope of enumerated powers and did not have separation of powers problems, then it would possibly be a violation of the Establishment Clause because it "provided [religious groups] with a weapon that no atheist or agnostic can obtain." *See* City of Boerne v. Flores, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring).

The leading critic of RFRA suggests that case-by-case accommodation through the political process is preferred. *See* Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 U. ARK. LITTLE ROCK L.J. 619, 624 (1998) [hereinafter Hamilton, *Constitutional Rhetoric*] (arguing that *Smith* construes religion as a powerful, dynamic force that is capable of entering "the political battlefield and [securing] the accommodations most important to it"). However, when accommodation is done on a case-by-case basis, a violation of the Establishment Clause still looms in the background. The test to be used to measure a potential Establishment Clause violation would either be the *Lemon* test or the endorsement test. The first prong of the *Lemon*

exercise protection by statutorily mandating greater protection than was constitutionally required.[40] The Judiciary Committee's report echoed Justice O'Connor's concurrence in justifying RFRA by claiming that strict scrutiny does not create an absolute right to free exercise but does what rational basis scrutiny does not, respect free religious exercise as a fundamental right.[41] Furthermore, the

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test is whether the state action has a secular primary purpose. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). It is easy to see the inherent difficulties of satisfying that test even with the example suggested by the *Smith* Court of certain states' exemptions to generally applicable drug laws for religious use of peyote. *Smith*, 494 U.S. at 890. Clearly the purposes behind such laws are religiously motivated or preferential. Likewise, the Court's suggestion would not withstand the endorsement test. *See* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring) (articulating for the first time the endorsement test, which was later used by the Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 594–97 (1989)). The endorsement test looks to see if the government action "sends a message to nonadherents that they are outsiders, not full members of the political community," while showing favor to adherents of the religion endorsed. *Lynch*, 465 U.S. at 688. If religious liberty cannot be protected constitutionally, it is a hard sell to say that the legislature can authorize some religious accommodation requests but not others and not communicate endorsement of certain religions and practices over others.

[40] *See, e.g.*, S. REP. NO. 103-111, at 8–9, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898. There is a separate question of whether Congress can give more religious protection than is required by the Constitution. As one court said on the subject when reviewing a religious accommodation statute, "*Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty." Mayweathers v. Newland, 314 F.3d 1062, 1070 (9th Cir. 2002). The subject of this Note is the difficulty courts are interjecting into efforts to increase religious liberties protection based on apprehension regarding Establishment Clause violations from extending protection to religious rights and not other fundamental rights. However, the Court has pointed out before that when the government lifts a burden on religious exercise there is "no reason to require that the exemption come packaged with benefits to secular entities." Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 338 (1987). However, RFRA raised concerns that Congress was violating the separation of powers, essentially attempting to trump the Supreme Court's interpretation of the First Amendment. For a strong argument from a Postmodern perspective that this type of wholesale legislative accommodation might actually be bad for religion, see generally Hamilton, *Constitutional Rhetoric*, *supra* note 39; William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995). Notably, one court held that RFRA survived the Court's invalidating the law as it applied to the states in *Boerne*, considering it to be still good law as it applies to the federal government. *See* Christians v. Crystal Evangelical Free Church, 141 F.3d 854, 857–88 (8th Cir. 1998).

For an interesting case against the wisdom of legislatively accommodating religious exercise, presuming it is constitutional, see Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999).

[41] S. REP. NO. 103-111, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1896 (expressing that the textual constitutional mandate of protection from interference should account for the government's interest by allowing regulation only if there is a compelling interest that is achieved by narrowly tailored means) (citing *Smith*, 494 U.S. at 894 (O'Connor, J., concurring)).

legislative history indicates that the expansive nature of RFRA was necessitated by the lingering doubts that state and local lawmaking bodies could not be trusted to craft exceptions to generally applicable laws that fully protected religious minorities consistent with the principles underlying the Free Exercise Clause.[42] RFRA invoked the Remedial Clause of the Fourteenth Amendment to assert the federal government's authority over the States.[43]

Congress not only responded to *Smith* through RFRA, but also to *O'Lone* by requiring strict scrutiny review even of the free exercise claims brought by inmates of both state and federal prisons.[44] Echoing previous Supreme Court decisions that inmates still possess First Amendment Rights, RFRA required that regulations substantially burdening an inmate's free exercise rights be of the highest order of penological concern.[45] Under RFRA, inmates and the society-at-large were once again subject to the same, heightened standard of review.

Four years after RFRA was enacted it was invalidated as applied to the States in *City of Boerne v. Flores*.[46] In *Boerne*, a Catholic church sought permission to enlarge its building because attendance at weekly ceremonies was exceeding seating capacity.[47] When the City of Boerne rejected the church's building permit application because the church building was located within a historic district, as designated by the city's Historic Landmark Commission,[48] Archbishop Flores sued for relief using RFRA to support his claim on free exercise grounds.[49] While Congress had the "power to enforce the Free Exercise Clause" under section 5 of the Fourteenth Amendment,[50] the *Boerne* Court reasoned it did not follow that Congress could force states to raise their level of review in free exercise claims because that was more than was required by the First Amendment under *Smith*.[51]

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[42] S. REP. NO. 103-111, at 8, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897 (citing *Barnette*, 319 U.S. at 638, which held that the purpose of the Bill of Rights was to place certain fundamental rights beyond the reach of popular vote).

[43] S. REP. NO. 103-111, at 13–14, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1903. The provisions of the Fourteenth Amendment relied on by Congress include: "No State shall . . . deprive any person of life, *liberty*, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added); and "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[44] S. REP. NO. 103-111, at 9–10, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898–1900.

[45] *See* S. REP. NO. 103-111, at 10, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899 (case references omitted).

[46] 521 U.S. 507 (1997).

[47] *Id.* at 511–12.

[48] *See id.* at 512.

[49] *See id.*

[50] *See id.* at 519.

[51] *See id.* at 519. "Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause." *Id.* The Court explained at great lengths the purpose behind

In *Boerne*, the Court held that RFRA overstepped the balance of power established between the Court and Congress since *Marbury v. Madison*,[52] and it was not enacted under the authority of any enumerated or implied power of Congress.[53] Even though RFRA was invalidated as it applied to the States, its heightened standard still controls free exercise claims against the federal government.[54]

It is important to note that Justice Stevens, writing alone in concurrence in *Boerne*, opined that RFRA violated the First Amendment's Establishment Clause.[55] He argued that RFRA gave to the religious "a legal weapon that no atheist or agnostic [could] obtain," which would amount to a "governmental preference for religion, as opposed to irreligion."[56] Stevens's reasoning, which other courts would later adopt, shifted the constitutional issue surrounding legislative accommodation away from whether legislatures had the authority to act to whether they violated the Establishment Clause by acting.

C. *The Emergence of RLUIPA as the Alternative to RFRA*

Thwarted in its attempts to eliminate the effects of *Smith* altogether, Congress acted much less ambitiously in its next attempt to increase free exercise protection, extending it legislatively only to regulate states in the areas of land use and treatment of institutionalized persons. The Religious Land Use and Institutionalized Persons Act (RLUIPA) was passed in September 2000, this time under the authority of Congress's Spending and Commerce Clause powers rather than the Fourteenth Amendment's remedial power.[57] The legislative history of RLUIPA reveals a concern that "[f]ar more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials"

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the Fourteenth Amendment's remedial power was to achieve compliance with the Constitution, not to authorize substantive changes to the law. *See id.* at 520–29.

[52] 5 U.S. 137 (1803).

[53] *Boerne*, 521 U.S. at 536.

[54] *See* Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) (citations omitted); *see also* Christians v. Crystal Evangelical Free Church (In re Young), 141 F.3d 854 (8th Cir. 1998).

[55] *Boerne*, 521 U.S. at 536 (Stevens, J., concurring).

[56] *Id.* at 537.

[57] *See* 42 U.S.C. § 2000cc-1(b) (2000).

> Scope of application. This section applies in any case in which —
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

Id.

who "sometimes impose frivolous or arbitrary rules" when it comes to inmates' rights to practice their faiths.[58]

RLUIPA's substantive provision is nearly identical to RFRA, requiring that government action that burdens religious exercise must be justified by a compelling state interest and be the least restrictive means possible.[59] The courts that have reviewed RLUIPA found it to rest on a firmer foundation than RFRA, consistently holding it to be a legitimate exercise of Spending and Commerce power.[60] Congress also heeded the separation of powers lesson of *Boerne*, and did not design RLUIPA to overrule *Smith* as RFRA had. By limiting the scope of RLUIPA, Congress hoped that courts would affirm RLUIPA and hold that *Smith* only set the constitutional floor for protecting religious exercise, and legislatures could raise the ceiling of protection if they so desired.[61] Judges, however, would adopt Justice Stevens's reasoning from *Boerne*[62] and invalidate RLUIPA as a violation of the Establishment Clause.[63] By holding that a statute which protects the religious exercise of inmates from unwarranted governmental burdens violates the Establishment Clause because non-religious inmates cannot experience protection of religious rights, thereby creating an unlawful preference for religion, the courts embraced Postmodern reasoning and placed religion clause jurisprudence squarely on Highway 61.

III. THE PHILOSOPHICAL INFLUENCES ON THE RELIGION CLAUSES

In today's age, religion is commonly believed to be a matter of personal choice.[64] If that is the case, it becomes an arbitrary practice for the state to give

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[58] 146 CONG. REC. S7,774-75 (daily ed. July 27, 2000) (statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

[59] 42 U.S.C. § 2000cc-1(a) (2000).

> No government shall impose a substantial burden on the religious exercise of [an institutionalized person] . . . unless the government demonstrates that imposition of the burden on that person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

Id.

[60] *See, e.g.*, Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003).

[61] *See, e.g.*, *Mayweathers*, 314 F.3d at 1070.

[62] *See Boerne*, 521 U.S. at 536–37 (Stevens, J., concurring).

[63] *See* Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003); Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003), *rev'd*, 355 F.3d 310 (4th Cir. 2003); Al Ghashiyah v. Dep't of Corrections, 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *overruled by* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003).

[64] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1491–92 (1990); *see also* Rebecca Redwood

special constitutional protections to an individual who, through an act of conscience, has chosen to follow a religion, yet withhold those protections from an equally conscientious individual who has chosen not to adhere to a religion.[65] To the Framers of our Constitution, however, religion was an individual's attempt, regardless of the form it took, to satisfy the demands of the sovereign of the universe, a fixed unchangeable God to whom all duties flowed. Ultimate accountability to God was inevitable; it was not a choice.[66] Because the Founders largely presupposed a "universal and transcendent authority beyond human judgment,"[67] protection of religious exercise was not an arbitrary privilege given to the religious. Instead, it was a necessary recognition of the limitation of civic authority in light of the ultimate authority.[68]

Behind the change in understanding the role of religion is the philosophical shift in worldviews between the time of the founding and this present age. The prevalent worldview during the founding of the United States was a religiously inclined Modernity. In the last several decades, the Postmodern worldview has become more pervasive. With Postmodern thought now influencing courts' analysis of the Modernity inspired Religion Clauses, it becomes essential to understand the basic philosophical differences between the Modern and Postmodern worldview for creating a coherent religion clause jurisprudence. In section A, this Note will first explore Modernity and its influence over the creation of the Religion Clauses. Next, in section B, this Note will discuss the

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French, *From* Yoder *to Yoda: Models of Traditional, Modern and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 77 (identifying a specific model of Postmodern religion that is regarded to be a matter of personal choice, where "[r]eligion is a self-created entity or . . . identity centered in spiritualism, power, and wisdom").

[65] McConnell, *supra* note 64, at 1492 (citing DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 136–146(1986)).

[66] *See* McConnell, *supra* note 64, at 1445–55. "The demands of civil society must be judged against the demands of God." *Id.* at 1446. The demands of an all powerful being would not have been considered optional. "[Religious people] have a Master in heaven, no earthly power can constrain them to deny his name or desert his cause." *Id.* at 1446 (quoting J. WITHERSPOON, *The Charge of Sedition and Faction Against Good Men, Especially Faithful Ministers, Considered and Accounted For*, in 2 THE WORKS OF THE REV. JOHN WITHERSPOON 415, 427 (Philadelphia 1802)). Use of the word "master" invokes the image of an authority figure capable of depriving the servant of its own volition. Similarly, James Madison wrote, in perhaps the most influential document on the Founders regarding the intersection between religious practice and civic laws, "'[i]t is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.'" Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post modern Age*, 1993 BYU L. REV. 163, 169 (1993) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* § 1 (1785), *reprinted in* Everson v. Bd. of Educ., 330 U.S. 1, 64 (1947) (Rutledge, J., dissenting)). Madison's words suggest the only element of choice is in how to render homage to God, not whether it should be rendered.

[67] McConnell, *supra* note 64, at 1497.

[68] *See id.* at 1497–98.

shift to Postmodernism, focusing particularly on its impact on thought regarding religion.

A. *The Constitution Was Written Under the Sway of (Pre)Modernity*

"We are a religious people whose institutions presuppose a Supreme Being."[69]

1. *Philosophical Origins of Modernity*

Generally, Modernity existed as the predominant philosophical worldview from the Renaissance to the post-Enlightenment industrial age[70] roughly from 1648[71] to 1945.[72] René Descartes's maxim, "I think, therefore I am,"[73] earned him the label of father of Modern philosophy.[74] The philosophy of Descartes

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[69] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[70] *See* STANLEY J. GRENZ, A PRIMER ON POSTMODERNISM 57–61 (1996). The Renaissance gave rise to humanism, which focused on humanity's potential and increased appreciation for the natural world, essentially laying the foundation for "modern scientific enterprise." This was a stark contrast to the Middle Ages, which focused on the study of God as the highest of human callings. The Enlightenment, or the Age of Reason, (roughly 1650 to 1800) followed the Renaissance and amounted to a revolution in man's understanding of the world through science. Mastery of science enabled people to have greater control of the physical world, which ushered in the Industrial Age, which at once had the effect of civilizing and dehumanizing people. "Modern" thought, as I am using the term, spanned these three distinct historical periods.

[71] *See id.* The Modern era began at the conclusion of the Thirty Years' War in 1648 with the Peace of Westphalia, which made provisions for freedom of religion on the European continent. *See* Peace of Westphalia Treaty, Oct. 24, 1648, 1 Consol. T.S. 198. Interestingly, it was also the year that "[t]he term 'free exercise' first appeared in an American legal document" when Lord Baltimore required the government in Maryland to refrain from interfering with Christians' exercise of religion in the colony. McConnell, *supra* note 64, at 1425.

[72] *See* STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 28 (2000) (citing the Holocaust as "the most important social event precipitating a transition from modernism to postmodernism").

[73] RENÉ DESCARTES, DISCOURSE ON THE METHOD AND MEDIATIONS ON FIRST PHILOSPHY, PART 4, 21 (David Weissman ed., 1996).

> But immediately afterwards I noticed that whilst I thus washed to think all things false, it was absolutely essential that the 'I' who thought this should be somewhat, and remarking that this truth *'I think, therefore I am'* was so certain and so assured that all the most extravagant suppositions brought forward by the skeptics were incapable of shaking it, I came to the conclusion that I could receive it without scruple as the first principle of the Philosophy for which I was seeking.

Id.

[74] *See* GRENZ, *supra* note 70, at 63. Descartes rejected empirical senses as being epistemologically untrustworthy. From this position of doubt, he concluded that the certainty of

represented an important departure from divine revelation as the source of knowledge, to a rational autonomous individual deducing from the one foundational truth, the fact of self-existence, all other hidden truths with certainty.[75] Even though the discovered knowledge or truth was understood to be absolute, it was necessarily discovered egocentrically. The object was to achieve perfect reasoning in order to prevent skewing discoveries with personal experience and knowledge.[76]

The Cartesian or rational model of epistemology envisions a passive mind coming to knowledge by observing the objective world. Immanuel Kant introduced a "transcendental" way of knowing, which required the active participation of the mind.[77] Kant focused on moral duty, or oughtness, which he argued was knowable to all humans through innate *a priori* knowledge that could be imposed on reality.[78] Rather than limiting knowledge of intangible objects that could not be experienced through the senses (such as God and freedom)[79] to what could be deduced through observation as under the Cartesian model, Kant argued intangible concepts could be fully known through "practical reason."[80] Kant's practical reason incorporated a belief that there was a universal moral duty of absolute right and wrongs that was knowable through the categorical imperative to "treat each rational individual 'always as an end and never as a means.'"[81] This

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his own existence was unquestionable. Using this first principle and foundational truth, Descartes reasoned that humans were autonomous rational subjects who through skepticism and deduction could conclude with certainty other absolute truths. *See* FELDMAN, *supra* note 72, at 22. The Modern philosophers that followed "accepted the Cartesian method of beginning with doubt and insisting that every belief be considered false until proven true. . . ." GREENZ, *supra* note 70, at 64–65. Descartes reduced his concept of self to reason and the rational being, the foundational principle of Modernity.

[75] *See* FELDMAN, *supra* note 72, at 22; GRENZ, *supra* note 70, at 64. The scientific world was making discoveries at an unprecedented pace by mimicking Cartesian skepticism's reason model of epistemology. Scientists shifted their endeavors away from metaphysical pursuits and focused their study of natural phenomena by "applying analytical techniques to produce quantifiable results." GRENZ, *supra* note 70, at 66. Science in this age concluded that the natural world or reality was intelligible, and that humans had the ability to understand the objective principles underlying the universe, making them capable of subduing and transforming it. The work of Newton, Copernicus, and Galileo, who by building on the work of Bacon were able to explain the rational consistency of the physical world, can be seen as the high point of the new model for science. *See* FELDMAN, *supra* note 72, at 17; GRENZ, *supra* note 70, at 66–67. This objectivist view that reality is knowable through reason, is the hallmark of Modern thought.

[76] *See* GRENZ, *supra* note 70, at 64.

[77] *Id.* at 74–75.

[78] *See id.* at 77–78; FELDMAN, *supra* note 72, at 26.

[79] Kant called this *noumena*. GRENZ, *supra* note 70, at 77.

[80] *See id.* at 77.

[81] FELDMAN, *supra* note 72, at 26 (quoting IMMANUEL KANT, CRITIQUE OF PURE REASON (Theodore M. Greene ed., 1929 (1781)). *See* GRENZ, *supra* note 70, at 77–78 ("Act as if the

is the transcendental pretense essential to Modern thought; that through reflecting on self all universal truths could be known.[82]

While faith in pure reason was the cornerstone of Modern philosophy, the conception of God was still the center of early Modernist understanding of the world.[83] Having rejected divine revelation as a way of knowing, Modernity turned instead to analyzing the natural world and seeking transcendental knowledge to inform its understanding of God.[84] Through this endeavor, "natural laws" became self-evident truths that were universally accessible, which could be used to guide human relations and establish systems of government.[85] Modern philosophy espoused that the progressive increase in knowledge brought the ability to make humans happy, rational, and free.[86] Since reason and nature were accessible to all people and could be used to discover ultimate truth, which led to happiness, there came an increased emphasis on individual autonomy as the value of external authorities diminished.[87] Although a generally accepted belief in God survived this Age of Reason, the church's preeminent role in society, often as a partner with the state, did not.[88] The Modern emphasis on autonomy encouraged

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maxim of thy action were to become by thy will a Universal Law of Nature.") (quoting IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS 38 (Thomas K. Abbott trans., Bobbs-Merrill, 1949)).

[82] GRENZ, *supra* note 70, at 78–80.

[83] Some refer to this early Modernity as Pre-modernist, but I think this is based on the faulty assumption that Modernism is necessarily antagonistic to belief in the spiritual.

[84] *See* GRENZ, *supra* note 70, at 68. Central to the modern metaphysical notion of God was the assumption of harmony in the natural world, a belief that reality was inherently orderly and ultimately reasonable. Truth could not be relative, so the variation of conclusions drawn from nature were attributable to failing to fully conform understanding to reality.

[85] *Id.*

[86] *Id.* at 71.

[87] *See id.* at 69 (emphasizing that "autonomy demanded that each person discover and follow the universal natural law"). "'One of the central themes, perhaps indeed the central obsession, of Cartesian rationalism is the aspiration for autonomy. There is the overwhelming desire for... self-creation....'" Steven D. Smith, *Religious Freedom in America, in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 15, 20 (Stephen M. Feldman ed., 2000) (quoting ERNEST GELLNER, REASON AND CULTURE 157 (1992)).

[88] GRENZ, *supra* 70, at 71 ("The Age of Reason marked the end of the dominance of the church in Western culture."). Interestingly, the power of the church was diminished in part by a religious movement: the Reformation. While the Reformation was a Pre-Modern occurrence, it contributed to the Modern view of the world in several ways: 1) Societal authorities were no longer inviolable because of religious tradition as was evident from the Protestant challenge to the Catholic church; 2) Enhanced commitment to individualism favored personal access to God without the need for priestly intervention; 3)Theological dualism, or two-kingdom, theology emerged as an increasingly popular lens through which to view government and; 4) Separation between the secular realm and the spiritual realm gained strength as authority of the state did not have to be validated by religious authority.

the political belief in liberalism that "places individual freedom at the center of political aspiration."[89] Although the church's influence was waning, two Protestant theological ideas, the two-kingdoms theology and soul liberty, were essential to conceiving the limited government required by political liberalism.[90] Two-kingdoms theology articulated a belief that there were two sovereigns, an earthly power and a spiritual one, with ultimate allegiance owed to God.[91] Soul liberty "is the belief that faith, to be valid and acceptable to God, must be uncoerced."[92]

2. *The Influence of Modern Thought on the First Amendment*

The Modern worldview was most prevalent at the end of the Eighteenth Century, the time period that the Constitution and the Bill of Rights were written, debated, and ratified as the supreme law of the land. It is undeniable that the Constitution, particularly the religion clauses, was written under the sway of Modernity. James Madison, the framer of greatest influence over the Bill of Rights, was highly sympathetic to the Modern understanding of religion and the need to limit government to prevent encroachment into the religious lives of the governed.[93] However, the desire of the Framers to protect religion was not entirely motivated by deference to religion. Many argued that religious protection was necessary from a civic perspective to ensure harmony among the citizenry.[94]

The historical record of the drafting of the First Amendment reveals two noteworthy Modern influences on the formulation of the religion clauses.[95]

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[89] *See* McConnell, *supra* note 66, at 166–67 (noting that historically, liberalism originated in religious ideals and is distinct from present day secular political liberalism).

[90] *See id.* at 166–72. Two-kingdoms theology's focus on the obligation of the individual to follow the dictates of conscience out of duty to God, and soul liberty's suspicion of coercion were highly influential the First Amendment rights of free exercise and antiestablishment. *Id.*

[91] *See id.* at 167–70. Two-kingdoms theology essentially amounts to giving to Caesar what is Caeser's and to God what is God's. *See Matthew* 22:21.

[92] *See* McConnell, *supra* note 66, at 170.

[93] *See* McConnell, *supra* note 64, at 1452–55.

[94] *See id.* at 1442–43 (stating that "[t]he paradox of the religious freedom debate[] . . . is that one side employed essentially secular arguments based on the need[] for civil society for the support of religion, while the other side employed essentially religious arguments...").

[95] *See* McConnell, *supra* note 64, at 1480–85. Most drafting history regarding the religion clauses must be gleaned from successive draft proposals, as the debates surrounding the proposals went largely unrecorded. *Id.* at 1481. The first proposal in the House was written by Madison and read, "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext, infringed." *Id.* The version that went to the floor came from the Select Committee, which modified Madison's original to read, "no religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 1482. That differed from the version ultimately passed the House which read, "Congress shall make

Congress chose "prohibiting" to describe the forbidden effect on the free exercise of religion, over "preventing" or "infringing" from earlier drafts, or "abridging" as used to describe the forbidden effect on other First Amendment rights.[96] Contrary to the view espoused by the Supreme Court recently that Congress had a freer hand with religious exercise than the press,[97] Madison argued that free exercise and freedom of the press were "*equally* and *completely* exempted from all authority whatever of the United States."[98] The other Modern influence discernable in the drafting history was that the phrase "Free Exercise of Religion" ultimately stood alone, and the phrase "Rights of Conscience" was omitted from the final version.[99] "By deleting references to 'conscience,' the final version of the [F]irst [A]mendment singles out religion for special treatment," since only a duty owed to God could justify limiting the reach of the earthly sovereign.[100] As ratified in 1791, the First Amendment presupposed the existence of God.

B. *The Constitution Is Being Interpreted in a Postmodern Age: "God Is Dead."*[101]

1. *Philosophical Foundations of Postmodernism*

Postmodernism as a worldview reacts to or rejects the basic premises of Modernity,[102] particularly the belief that "[k]nowledge can only be justified to the extent it rests on indubitable foundations."[103] Friedrich Nietzsche, who has been called the "patron saint of [P]ostmodern philosophy,"[104] proclaimed the death of

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no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*

The Senate considered two versions before settling on this third attempt, "Congress shall make no law establishing Articles of faith or mode of worship, or prohibiting the free exercise of religion." *Id.* at 1484. The final version that came out of Conference Committee was ultimately enshrined as the First Amendment, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[96] McConnell, *supra* note 64, at 1486–88.

[97] *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

[98] McConnell, *supra* note 64, at 1487–88.

[99] *See id.* at 1488.

[100] *See id.* at 1491.

[101] FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHUSTRA (Manuel Komroff ed., Tudor Publishing Co. 1928).

[102] *See* GRENZ, *supra* note 70, at 2.

[103] *See* DENNIS PATTERSON, LAW AND TRUTH 152, 153 (1996) (explaining that Postmodernism rejects epistemological foundationalism, which holds that there is absolute truth and it is knowable, especially that resting on religious authority).

[104] GRENZ, *supra* note 70, at 88. Nietzsche as a philosopher was a nihilist. His ideas are important to Postmodernism, but they do not fully capture the complexity of present day

God[105] in what amounted to a rejection of Modern thought, primarily a rejection of the idea of a "unifying center."[106] Postmodernism rejects Cartesian dualism as a delusional belief that thinking humans are capable of pure reason because it ignores the reality that the human self was also an object "enmeshed in social networks."[107] Likewise, Postmodernism also rejects the "Kantian fiction of an objective world existing in its own right beyond the self."[108] Any attempts to conceptualize the objective world would necessarily be limited because human will and experience necessarily distort an individual's perception.[109] Rather than deriving value from absolute, objective truth, Postmodernism conceives of nonessentialism, a belief acknowledging the subjectivity of reality and that "things have value...only to the extent that we give them value."[110] Since Postmodern thought understands truth as an individual's preference between

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Postmodern thought. Jacques Derrida, Michel Foucault, and Richard Rorty are the leading figures of Postmodernism, but each stood on the shoulders of Nietzche. For a more complete introduction to Postmodernism, see THE POSTMODERN READER (Charles Jencks ed., 1992).

[105] This famous quote is from Nietzsche's landmark work THUS SPAKE ZARATHUSTRA (1883). Nietzsche saw himself as a physician of culture who could cure some of the defects of humanity by remystifying its conception of reality, that is, by eliminating the false notions, such as the human conception of God, which, in his view, created an unmerited sense of certainty.

[106] GRENZ, *supra* note 70, at 83. Michel Foucault rejected the unifying center concept when he identified as fundamental errors of Western civilization beliefs that 1) an objective body of knowledge exists and is waiting to be discovered, 2) such knowledge can be possessed and is neutral or value free, and 3) the pursuit of knowledge benefits all humankind and not just a particular class. *Id.* at 131.

[107] *Id.* at 86. This was described by the prominent Postmodern philosopher Richard Rorty as an "unhelpful tendency of Western philosophy and culture to assume that the knowing self can occupy a position beyond the ebb and flow of our historical context" erroneously imagining "that they can transcend the vocabulary and practices of their own time and discover a universal, timeless, necessary, ahistorical 'truth.'" *Id.* at 156–57.

[108] *Id.* at 87.

[109] *See id.* at 92–93.

[110] GRENZ, *supra* note 70, at 93 (stating Postmodernism's understanding of perspectivism leads to the conclusion that attempts to conceptualize reality objectively result in deception rather than knowledge and destroy "the original richness of human experience"). Belief that all value is relational, rather than an object having intrinsic value is called nonessentialism. *See id.* at 152.

One of the resounding themes of Postmodern thought is that language is an insufficient tool to adequately represent reality, counter to the Modern conception of language. *See* PATTERSON, *supra* note 103, at 160–61. For examples of how Postmodernism views language, particularly within the context of law, see Stephen M. Feldman, *How to Be Critical*, 76 CHI.-KENT L. REV. 893 (2000); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992); and M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y.L. SCH. L. REV. 451 (1999).

varying interpretations, it dismisses religious efforts to uncover "universal, timeless, necessary, ahistorical" truth as unhelpful.[111]

2. *Postmodernism's Effect on the Understanding of Religion*

Beliefs about religion's relationship to government that are unique to Modernism have been challenged by the emergence of Postmodernism. For example, the principle of liberalism, which under Modernity required a government to have limited reach into the religious sphere, has been transformed into an ideology championing individualism, independence, and rationality under Postmodernism.[112] While these are principles rooted in the Modern conception of liberalism, as applied to religion these principles have taken a distinctly Postmodern incarnation, eschewing the idea of foundational truth, which is the crux of traditional religious belief. Postmodern individualism elevates independent conscientious belief over religious beliefs that contain communitarian elements, which are perceived as compromising individuality.[113] Independence as articulated by the present age requires that individuals choose their own religions, contradicting the Modern view that individuals were duty bound to comply with the mandates of God, the only choice being whether to rebel or obey.[114] Additionally, Postmodern rationality opposes faith and tradition to the point of teetering on the brink of nihilistic skepticism.[115]

Another shift away from Modernity is the Postmodern emphasis on tolerance of religion rather than the free exercise of religion.[116] Tolerant neutrality manifests itself by imposing a requirement of secularity in the public sphere,

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[111] *See* GRENZ, *supra* note 70, at 157–58. Richard Rorty is the leading proponent of a non-nihilistic, non-relativistic Postmodernism, where truth is shaped by individuals rather than waiting to be discovered in hopes of "getting [it] right," and though pluralistic, this philosophy does not concede that all conceptions of truth are equal. *Id.* at 157.

[112] McConnell, *supra* note 66, at 172.

[113] *See id.* at 172–73 (recognizing that mutual obligation and submission, which are elements of traditional religions, could be "authoritarian, irrational, and divisive," which is not a risk run with truly individualized beliefs).

[114] *See id.* at 173 (reiterating the modern belief that individuals are chosen by God and the duty of conscience is to obey God's moral order in contrast to the Postmodern belief that independence is conforming to no one but oneself).

[115] *See id.* at 173–74 (pointing out that religion is seen by some as a divisive force "fundamentally incompatible with the intellectual cornerstone of the modern democratic state"). *See generally* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993).

[116] *See* McConnell, *supra* note 66, at 175–76 (pointing out that tolerance as a value is a misnomer, because frequently unpopular beliefs are not tolerated, indicating that the Postmodern mind is only neutral to that to which it is indifferent). Tolerance of religion was originally the goal espoused by John Locke and Thomas Jefferson of government's relationship to religion, but it lost out to Madison's view of government being obligated to allow the free exercise of religion. *See* McConnell, *supra* note 64, at 1449–55.

requiring religious individuals to keep their faith to themselves.[117] Finally, Postmodernism accepted the expansion of government, creating a regulatory state in contrast to the Modern ideal of limited scope of government power.[118] By increasing the reach of government into realms previously the province of religion, such as education, social welfare, and moral instruction,[119] conflicts between religion and state, which had been extremely rare, became increasingly common after the end of World War II.[120] Religion as viewed by Postmodernism, rather than being a part of the search for truth, becomes just another expression of individual belief entitled to no more protection than any other secularized expression of belief.[121]

IV. THE POSTMODERN INFLUENCE ON RELIGION CLAUSE JURISPRUDENCE

A. Cutter v. Wilkinson: *A Case Study in Postmodern Religion Clause Jurisprudence*

Until 2000, pending lawsuits filed by religious inmates against state prison officials claiming prison regulations infringed on their free exercise rights had

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[117] *See* McConnell, *supra* note 66, at 174. *See also* RICHARD NEUHAUS, THE NAKED PUBLIC SQUARE 148 (1984) ("We are arriving at the point where the privileged status of religion, which was clearly the intention of the First Amendment, is becoming the most particular handicap of religion....Pluralism is a jealous God. When [it] is established as dogma, there is no room for other dogmas.").

[118] *See* McConnell, *supra* note 66, at 177–78. Winnifried Sullivan correctly notes the division of church from state into two separate provinces was a uniquely modern conception. *See* Winnifred F. Sullivan, *A New Discourse and Practice*, *in* LAW AND RELIGION: A CRITICAL ANTHOLOGY 35, 38 (Stephen M. Feldman ed., 2000). Sullivan suggests that Postmodern influence in government was brought about by a concern for suppressed communities. *Id.* at 38–39.

[119] McConnell, *supra* note 66, at 177.

[120] *See* McConnell, *supra* note 64, at 1503. Indeed, the vast majority of the case law on the religion clauses emerged in the last half of the Twentieth Century. Scholars have noted that the Religion Clauses were not heavily litigated in the first century of the Republic. Indeed, the first decision regarding the Free Exercise Clause was not decided until 1879, and the first decision regarding the Establishment Clause was handed down in 1899. Michael W. McConnell, *The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic* 37 TULSA L. REV. 7, 7 (2001). McConnell cited to conducting public education in a plurastic society as one of the chief reasons for the increase in litigation over First Amendment religion issues following World War II. *Id.* At 27. In another article, McConnell and Judge Posner suggest that increased government aid to education and healthcare led to an increase in litigation involving religion issues because of the great number of educational and medical facilities with connections to organized religions. Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 8 (1989).

[121] *See id.* at 1416.

little chance of success, because a refusal to grant religious accommodations only had to be justified by "legitimate penalogical objectives."[122] The passage of RLUIPA meant that prisoners could augment their First Amendment claims with a statutorily created requirement that religious exercise be accommodated, unless there is a compelling interest that justifies the infringement, and there is no less restrictive means of achieving that interest.[123] Many of the states' departments of corrections (DOC) officials believed that the return of strict scrutiny, and with it the presumption that state action was unconstitutional, would threaten a well-ordered prison and prove too burdensome on the cash-strapped correctional system. DOCs influenced defendants in RLUIPA actions to assert the affirmative defense that RLUIPA was unconstitutional.[124]

A DOC mounted a successful defense in the Sixth Circuit case *Cutter v. Wilkinson*.[125] *Cutter* involved the claims of inmates belonging to fringe religious groups, such as Wiccans, Asatru, or members of a splinter group of the Church of God Christian,[126] whose requests included primarily religious literature and limited assembly rights for religious services. The inmates won their suit in the

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[122] This standard was required by *Turner v. Safley*, 482 U.S. 78, 89 (1987). Judges hearing such claims are also required to exhibit strong deference to the decisions of prison officials. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

[123] *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(2000).

[124] In the context of prisons, states that have challenged RLUIPA's constitutionality include Michigan (Johnson v. Martin, 223 F. Supp. 2d 820 (W.D. Mich. 2002)); Ohio (Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003)); Wisconsin (Kilaab Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003)); Massachusetts (Gordon v. Pepe, 2003 U.S. Dist. LEXIS 4623 (D. Mass. 2003)); Virginia (Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003)); Illinois (Vineyard Christian Fellowship v. City of Evanston, 250 F. Supp. 2d 961 (N.D. Ill. 2003)); California (Mayweathers v. Newland, 258 F.3d 930 (9th Cir. 2001)); Missouri (Murphy v. Missouri Dep't of Corr., 372 F.3d 979 (8th Cir. 2004)). The DOCs argue that RLUIPA either exceeds Congress's power under the Commerce or Spending Clauses, or violates the Establishment Clause. *See Cutter*, 349 F.3d at 259.

[125] 349 F.3d at 268–69.

[126] The Concise Oxford Dictionary of World Religions notes that what might be considered witchcraft is often known as Wicca, which "is embedded in a wider neo-Paganism . . . . Followers of Wicca seek their inspiration in pre-Christian sources, European folklore, and mythology." THE CONCISE OXFORD DICTIONARY OF WORLD RELIGIONS 638–39 (John Bowker ed., 2000). Asatru is identified as a revival of Norse heathenism and the mythology of Scandinavia, which in its modern incarnation often has racist beliefs grafted onto its core tenants. B.A. Robinson, *Asatru*, *in* RELIGIOUS TOLERANCE, *at* http://www.religioustolerance.org/asatru.htm (last visited Sept. 18, 2004). A website identifies the Worldwide Church of God as being founded in Anglo/British Israelism, a belief that Anglos "are the spiritual and literal descendants of the ancient Israelites" and that people claiming to be Jewish today are actually Gentiles. B.A. Robinson, *The Worldwide Church of God*, *in* RELIGIOUS TOLERANCE, *at* http://www.religioustolerance.org/wwcog.htm (last visited Sept. 18, 2004).

district court but lost on appeals as RLUIPA was held to be an unconstitutional violation of the Establishment Clause because it failed the *Lemon* test.[127]

The *Cutter* Court began its analysis of the constitutional issues by discussing Justice Stevens's concurring opinion in *Boerne*, in which he concluded that RLUIPA's predecessor, RFRA, violated the Establishment Clause.[128] Stevens' reasoning, that since the statute "provided the Church with a legal weapon that no atheist or agnostic can obtain" it constitutes a "governmental preference for religion, as opposed to irreligion," thus violating the First Amendment religion principles, is invoked as the polestar for the court to follow.[129] RLUIPA, the *Cutter* Court concluded, violated the Establishment Clause "because it favor[ed] religious rights over other fundamental rights without any showing that religious rights are at any greater risk of deprivation."[130]

1. Cutter *Found RLUIPA Violates the Purpose Prong of the* Lemon *Test.*

To assess the Establishment Clause claim, the court analyzed RLUIPA under the three-pronged establishment test from *Lemon v. Kurtzman*.[131] The first prong requires that a secular purpose exist to justify state action. However, the *Cutter* court imposed an additional requirement of neutrality to the test, which was articulated as a prohibition against government endorsement of a specific religion or general promotion of religion.[132] By interpreting the secular purpose requirement of *Lemon*[133] to focus on strict neutrality, the *Cutter* court imposes a

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[127] *Cutter*, 349 F.3d at 268. (referring to the test originating in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) used as a framework to evaluate Establishment Clause claims, which requires a secular purpose for the state action, a primary or principal effect which neither advances nor inhibits religion, and does not result in excessive entanglement between religion and the state).

[128] *Cutter*, 349 F.3d at 261 (citing to *Boerne*, 521 U.S. at 536–37 (Stevens, J., concurring)).

[129] *Id.* (quoting *Boerne*, 521 U.S. at 536–37). The *Cutter* Court also relied heavily on two district court cases that followed Stevens' reasoning and found that RLUIPA violated the First Amendment. *See Cutter*, 349 F.3d at 262 (citing to Madison v. Riter, 240 F. Supp. 2d 566 (W.D. Va. 2003), *rev'd by* Madison v. Riter, 355 F.3d 310 (4th Cir. 2003); *see also* Kilaab Al Ghashiyah v. Dep't of Corr., 250 F. Supp. 2d 1016 (E.D. Wis. 2003), *overruled by* Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003).

[130] *Cutter*, 349 F.3d at 262 (reaching this conclusion without ever considering RLUIPA's validity under the Commerce or Spending powers).

[131] *Id.* at 262–63.

[132] *Cutter*, 349 F.3d at 262 (citing Bd. of Educ. v. Grumet, 512 U.S. 687, 703 (1994) for the proposition that "government should not prefer one religion to another, or religion to irreligion").

[133] In *Lemon*, the Court required that the state must "have a secular legislative purpose." *Lemon*, 403 U.S. at 612. This was not seen as being identical to a position of complete neutrality or indifference toward religion. In *Lynch v. Donnelly*, 465 U.S. 676 (1984), the Court

higher standard for statutes touching on religion than is constitutionally required.[134] Under this more vigorous framework, the court concludes that since RLUIPA is so broadly written to accommodate all religious exercise, the law abandons neutrality because it advances religious rights generally in prisons over other constitutionally protected conduct.[135]

Driving the *Cutter* court's finding that RLUIPA abandons neutrality was its belief that RLUIPA imposes a "revolutionary" change in the treatment of free exercise claims of inmates by requiring DOC regulations to withstand strict scrutiny.[136] The *Cutter* court suggested that such a revolution could only be

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approved a state-funded display of the nativity scene, included with other holiday decorations, on non-public grounds as constitutional. The *Lynch* Court chastised the lower court, which held otherwise, for inferring that a religious display like a crèche could not also have a secular purpose. *Id.* at 681. In her concurring opinion, Justice O'Connor wrote that a secular purpose that in reality is dominated by a religious purpose would not be permissible. *Id.* at 691 (O'Connor, J., concurring). But the underlying assumption is that a dominant secular purpose would mitigate the influence of any religious purpose for state action. *Id.* In his concurring opinion in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Powell reasserted that the court has "not interpreted the first prong of *Lemon*...as requiring that a statute have 'exclusively secular' objectives." *Id.* at 64 (Powell, J., concurring).

[134] *See Cutter*, 349 F.3d at 263 (claiming that the purpose prong prohibits the "governmental decisionmaker...from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters") (quoting Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 335 (1987)). However, in that case, the Court only introduced the idea of neutrality after stating that the Establishment Clause has never been interpreted to require that a law's purpose be unrelated to religion. The *Amos* Court held that the purpose of alleviating the burden on religious organizations was a permissible legislative purpose. *Id.* at 335. In doing so, the Court never analyzed whether such an action was neutral to religion; it appeared to assume that doing so did not promote "a particular point of view in religious matters." *Id.* at 335.

[135] *Cutter*, 349 F.3d at 264. The Court distinguished the case from *Amos* in two relevant ways. The first difference between *Amos* and RLUIPA is that the accommodation approved in *Amos* was made to prevent a violation of the Establishment Clause by giving religious organizations exemptions to Title VII of the Civil Rights Act regarding hiring and employment decisions. *Amos*, 483 U.S. at 335–36. If religious organizations were not exempted, the reasoning was that the state would be interfering too much with the activities of an organized religion. As there is no Establishment Clause issue that RLUIPA alleviates, the legislative accommodation is not justified under this reasoning. *Cutter*, 349 F.3d at 263. The second is that the statute in *Amos* made a highly specific exception, while RLUIPA creates an exemption from laws of general applicability to all religious acts. *Id.* at 263–64.

[136] *See Cutter*, 349 F.3d at 265 (addressing RLUIPA's practical effect of requiring DOC officials to show that prison regulations are justified under the strict scrutiny standard instead of the lesser showing of a reasonable relation to a legitimate penalogical interest (citing *Turner*, 482 U.S. at 81–83; and *O'Lone*, 482 U.S. at 350–51)). The court uses the scope of the law as a proxy for the purpose of RLUIPA. *See Cutter*, 349 F.3d at 264 ("The broader scope of RLUIPA suggests that its actual purpose is not to accommodate religion by removing a particular obstacle to religious exercise, but 'to advance religion in prisons relative to other

acceptable if Congress acted on information that "religious rights are at greater risk of deprivation in the prison system than other fundamental rights."[137] Since Congress made no such finding, the court found RLUIPA had the impermissible effect of giving "'greater protection to religiously motivated conduct than other conscientious conduct.'"[138] By lifting a limitation "on one right while ignoring all others," the court asserted that Congress abandoned neutrality toward these fundamental rights, as it "plac[ed] its power behind one system of belief," thus violating the Establishment Clause.[139]

2. Cutter *Found That RLUIPA Violates the Effects Prong of the* Lemon *Test*

Satisfied that RLUIPA violates the purpose prong of the *Lemon* test, the court proceeded to the second prong, which requires that state action cannot have the effect of advancing or inhibiting religion.[140] Again, the test articulated by the court varies from the original articulation of the test,[141] their version requiring that government action cannot convey a message of endorsing or disapproving religion.[142] *Cutter* also enhances the endorsement test by asking, "(1) whether a particular government action benefits both secular and religious entities, and (2) whether the action will induce religious exercise, rather than only protecting it."[143] Under these criteria, RLUIPA violates the Establishment Clause because it impermissibly advances religion by giving "greater protection to religious rights than to other constitutionally protected rights."[144]

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constitutionally protected conduct,'" thus abandoning neutrality.) (quoting *Ghashiyah*, 250 F. Supp. 2d at 1027).

[137] *Cutter*, 349 F.3d at 265.

[138] *Id.* (quoting *Ghashiyah*, 250 F. Supp. 2d at 1027).

[139] *Id.* (citing *Madison*, 240 F. Supp. 2d at 577, *rev'd by Madison*, 355 F.3d at 322).

[140] *See id.* at 264 (invoking the effects prong of the *Lemon* test, but using the variation suggested in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

[141] *Lemon*, 403 U.S. at 612 ("[I]ts principal or primary effect must be one that neither advances nor inhibits religion.").

[142] *Cutter*, 349 F.3d at 264. The endorsement test originated in *Lynch*, 465 U.S. at 688 (O' Connor, J., concurring). Justice O'Connor explained that there were two ways of running afoul of the Establishment Clause—entanglement or endorsement. *Id.* at 687–88. Endorsement sends messages that individuals will have an improved or denigrated status in society because of their religious beliefs and the government's actions in respect of those beliefs. *Id.* at 688. As articulated by O'Connor, the test required that an assumption of either endorsement or disapproval existed wherever there was a plain case of governmental religious *discrimination*. *Id.* at 689. In *Lynch*, the application of the endorsement test resulted in finding the city-owned display of the crèche constitutionally permissible. *Lynch*, 465 U.S. at 687–94.

[143] *Cutter*, 349 F.3d at 264.

[144] *Id.*

RLUIPA fails the first part of this endorsement test because the court concluded that the added protection of religious activity can only benefit religious entities, not secular ones.[145] The court also held that RLUIPA fails the second part of the endorsement test as articulated in *Cutter* because it induces inmates to be religious and engage in religious activity.[146] Since prison rules would not apply with the same force to religious inmates, the court reasoned, it follows that inmates will become religious in order to receive the benefit of more lax regulation.[147] The court reasoned that in light of the reality of prison life, RLUIPA will make the pull of religion so strong that is should be considered an inducement.[148] Through RLUIPA, the court argues that the government gives religious prisoners preferred status in prisons, thereby impermissibly endorsing religion over irreligion, and creating an inducement for all prisoners to embrace a religion of their own. Satisfied that RLUIPA failed the first two prongs of the *Lemon* test, the *Cutter* court stopped its analysis and held that RLUIPA violated the Establishment Clause.

B. *A Critique of* Cutter's *Analysis As Postmodern*

Cutter is a great example of the fundamental inability of Postmodern thought to understand or accept the Modern philosophical assumptions that motivate the religion clauses. Both the Free Exercise Clause and the Establishment Clause were reinterpreted from their Modern origins to fit a Postmodern mold. The result is a First Amendment religion clause jurisprudence that would be incomprehensible and unjustifiable not only to the Framers, but also to a predominately Modern mind. By holding that the state cannot protect free exercise rights, without violating the Establishment Clause, unless it also protects other fundamental rights from state interference, the *Cutter* court has replaced the Modern idea of *separation* of church and state with the Postmodern idea of *absolute neutrality* between secular and religious ideals as the reason for the Establishment Clause. By holding that religion can be protected from state interference only if all other forms of conscientious beliefs and actions are similarly protected, the *Cutter* court has replaced the Modern *presupposition that God exists* for the Postmodern *belief that there is no foundational, essential truth* as the guiding principle of the Free Exercise Clause.

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[145] *See id.* at 266 (noting that a religious white supremacist would get a higher standard of review for his request for religiously motivated racist literature, but a similarly situated secular white supremacist would get a lower standard of review for an identical request for politically motivated racist literature).

[146] *Id.*

[147] *Id.* at 266–67 (citing *Ghashiyah*, 250 F. Supp. 2d at 1029, *overruled by* Charles v. Verhagen, 348 F.3d 601, 610–11(7th Cir. 2003)).

[148] *See id.* at 266.

1. *It is Postmodern to Require Absolute Neutrality Between Religious and Secular Ideals Under the Establishment Clause*

The Postmodern imposition of absolute neutrality was evidenced by the court's grafting neutrality onto the secular purpose prong of *Lemon*, requiring that the government's purpose cannot be the endorsement or disapproval of religion.[149] It was a subtle shift away from what *Lemon* originally required, that there only be a secular purpose for the law.[150] Making establishment synonymous with endorsement in *Lynch* and its progeny enlarged the concept of neutrality.[151] The *Cutter* court seized on the reasoning of *Lynch* and expanded establishment even further to include not only the endorsement of a specific religion, but also promotion of the idea that religion is something uniquely worthy of protection. The principles of separation are subsumed by adherence to this extreme notion of neutrality. The Postmodern holding is that a state action limiting government interference with religion must be unconstitutional because it promotes "a particular point of view in religious matters."[152]

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[149] *Cutter*, 349 F.3d at 263 (using a variation of the *Lemon* test first articulated in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). The standard was reiterated by O'Connor in *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring). In *Wallace*, she concluded that a statute allowing school students to have a moment of silence for prayer and meditation endorsed religion by encouraging prayer. *Id.* at 79. The endorsement test was eventually applied as an Establishment test by the Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 621 (1989) (holding that a crèche display in a government building was an endorsement of religion).

[150] *Lemon*, 403 U.S. at 603. Under the original test, even a religious purpose for a statute could be tolerated, so long as there was a secular purpose that dominated the intent. *See Lynch*, 465 U.S. at 691 (stating that a secular purpose dominated by a religious purpose is not good enough, but the Court went on to decide that there was a religious purpose behind displaying the crèche, which did not work to create an Establishment violation).

[151] *Lynch*, 465 U.S. at 687–89 (O'Connor, J., concurring). *Lynch's* endorsement test was espoused only as an alternative, when blatant favoritism or discrimination between religions existed, or just political divisiveness, but somehow was allusive under the *Lemon* test. *Id.* at 689. O'Connor identifies two ways of running afoul of the Establishment Clause. Both require that adherence to a religion affect a person's standing in the political community. The first is entanglement between the state and religious institutions, interfering with independence, giving benefits, or creating constituencies based on religion. *Id.* at 688. The second, which O'Connor identifies as a more direct infringement, is endorsement. If a state action plainly embodies intentional discrimination, then when understood in light of *Lemon* there is a presumption of endorsement, which can only be overcome by a showing of a compelling interest that motivated the state actor. *Id.* at 689. In my reading, O'Connor says that neutrality is only relevant after separation has been breached. If there is no breach of separation (understood as entanglement), then there should be no application of the endorsement analysis.

[152] *Cutter*, 349 F.3d at 263 (quoting *Amos*, 483 U.S. at 335). An Establishment Clause jurisprudence that emphasizes absolute neutrality would be incompatible with the clause that protects the free exercise of religion, if Postmodern interpretation did not expand the Free Exercise Clause to protect non-religious conscientious belief.

The understanding that the Establishment Clause requires absolute neutrality is rooted in the Postmodern values of tolerance, individualism, and independence.[153] Tolerance from a Postmodern perspective begins with the premise that "individuals have no legitimate interest in the attitudes, opinions, and character of others within the community."[154] Therefore, society has no reason to try to influence the thoughts of others.[155] As religion is based on the Modern premise that there is one absolute, foundational truth, religion necessarily implicates the personally, and privately, held beliefs of others.[156] Incorporating tolerance with a zealous anti-foundationalism, Postmodern thinkers concluded that government neutrality in all religious matters is essential. The Postmodern version of the liberal ideals of individualism and independence solidify this view. Independence, the belief in absolute autonomy, objects to perceived attempts to influence the individual in regard to such personally held beliefs that are the subject of religion. The ideal of individualism suggests that influence by the state in a matter of personal conscience is less desirable than being uninfluenced by other external sources. The Postmodern requirement of absolute neutrality makes it preferential for the government to infringe on free exercise of religion if only incidentally, rather than promoting or even protecting free exercise. The Postmodern mind is either blissfully ignorant of or simply unwilling or unable to reconcile the soul liberty justification which originally inspired the Establishment Clause.[157]

The interpretation of RLUIPA by the *Cutter* court is a demonstration of the Postmodern literary theory of deconstruction at its finest. The premise for deconstruction is that no proposition can be limited to a single meaning and often the more important message is in the subtext. The act of interpretation, then, is like a game. *See* GRENZ, *supra* note 70, at 113–14 (explaining the linguistic theory of Ludwig Wittgenstein who sees interpretation as a "language game"); *see also id.* at 132 (discussing Michel Foucault's view that knowledge is linked to power and objects are brought into being by identifying, specifying, and defining them). Here, the court is faced with a simple statute: the government cannot interfere with religious exercise without good reason. By focusing on the subtext of RLUIPA, that there are other liberties not being protected by the statute, the court concludes that the statute must be promoting religion. Deconstruction has been used to show that the presidential age requirement that the chief executive must be thirty-five years of age could prevent a thirty-eight-year-old from becoming president while permitting an eighteen-year-old to become president. Sinclair, *supra* note 110. For a strong critique against the use of deconstruction in the field of law, see Jay P. Moran, *Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction and Some Insights From Thomas Pynchon's Fiction*, 6 S. CAL. INTERDISC. L.J. 155 (1997).

153 *See supra* notes 107–16 and accompanying text.

154 McConnell, *supra* note 66, at 175.

155 Actions, however, are still the province of government.

156 *See supra* notes 82–83 and accompanying text (noting the belief that absolute truth was knowable and useful for achieving greater societal good).

157 *See supra* note 87 and accompanying text.

2. *It Is Postmodern To Require Protection for All Acts of Conscience Under the Free Exercise Clause*

While presupposing the existence of God was fundamental to the Framers' justification for the Free Exercise Clause, the *Cutter* court reinterpreted the free exercise principle to protect non-religious conscientious belief because special protection available only to religious exercise was unjustifiable in the absence of foundational, essential truth. This Postmodern view revealed itself in the court's effects prong analysis and is evident in the way the court frames the test. As originally articulated, the second prong of the *Lemon* test requires that the "principal or primary effect must be one that neither advances nor inhibits religion."[158] In *Cutter*, the court grafted on an additional factor to the effects-endorsement test, requiring that "a particular government action benefits both secular and religious entities."[159] The additional criterion is the result of the

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[158] *Lemon*, 403 U.S. at 612.

[159] *Cutter*, 349 F.3d at 264. The Sixth Circuit applied this factor due to its heavy reliance on the *Ghashiyah* case. *Id.* That court believed this standard was articulated in three Supreme Court Establishment cases, *Bd. of Ed. v. Grumet*, 512 U.S. 687 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970). *Id.* It is highly suspect that these cases can be read to create such a standard. In *Grumet*, the issue involved a state action that drew the boundaries for a school district along religious lines rather than using the "customary and neutral principles" for the task, which would have led to a different result. *Grumet*, 512 U.S. at 702. The Court invalidated the state action because there was reason to believe that, because of the unique nature of the religious boundaries, defining the district civic power would be conditional on an individual's adherence to the prevalent religion of the community. The result was a religious test to qualify for franchise, which the Court held to violate the Establishment Clause. *Id.* While the Court did stress the inappropriateness of extending benefits in a manner showing favoritism among religions, *Grumet* was a case of special favoritism to a specific religion, not religion generally. In *Texas Monthly*, the Court found a state sales tax exemption for religious periodicals to be unconstitutional, primarily because the exemption was considered a subsidy from "'indirect and vicarious'" donations from the taxpayers. *Texas Monthly*, 489 U.S. at 14 (quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983)). While it is true the Court suggests that extending the tax exemption to all non-profit groups and not just religious groups would cure the constitutional deficiency, the problem is more sponsorship than endorsement. *Id.* at 15–16. In *Walz*, the Court rejected an Establishment Clause claim premised on the practice of granting tax exemption for church buildings used for religious purposes, finding that the tax exemption for religious institutions and other socially beneficial organizations neither advanced nor inhibited religion. *Walz*, 397 U.S. at 672–73. Notably, the opinion is not expressly deemed to turn on whether nonreligious groups are also afforded a tax exemption. While all three opinions involve state actions toward religious entities that are clearly constitutional if also directed at non-religious entities, they do not stand for the proposition that impermissible endorsement occurs unless government action benefits both secular and religious entities.

Postmodern belief that individuals construct reality and there is no reason to elevate religion from other social creations.[160]

By requiring that state action have equal benefit to secular and religious entities, the *Cutter* court's decision makes any religious protection, even the Free Exercise Clause itself, impermissible unless the state also protects secular acts of conscience. It is possible that this is the inevitable result of the *Smith* decision, which demoted religious exercise to the same unaccommodated position of other acts of conscience.[161] The court's reasoning is flawed as it fails to comprehend that rights and protections that are uniquely religious by definition cannot be extended to secular entities. The *Cutter* court takes this to mean that religious inmates will have superior rights to non-religious inmates.[162] This result is intolerable to the Postmodern mind because without presupposing that God exists, the Modern justification for distinguishing between religious belief and other sincerely held beliefs does not hold.

The Postmodern belief that the Free Exercise Clause must be extended to secular acts of conscience rests on its conceptions of metaphysics, the role of government, and the ideal of rationality. The Modern view, motivated by its belief in two-kingdoms theology,[163] created the Free Exercise Clause to exempt an individual from civic obligation in order to fulfill obligations to God. In order

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[160] *See supra* notes 104–18 and accompanying text.

[161] *See supra* notes 4–29 and accompanying text. The *Smith* Court's resolution that accommodation for religion must be obtained through the legislature will become increasingly untenable as Postmodern jurisprudence invalidates the legislation, because it prefers religion over non-religion, creating a tautological trap for the free exercise of religion. The "trap" is made absolute when courts assert a separation of powers argument to invalidate the accommodation action of the legislature (which is not to say that legislative accommodations never violate separation of power). Certainly, *Cutter* relies on this unwarranted reasoning. To that court, the fact that RLUIPA gives more protection to religious exercise than was required by the Supreme Court is a reason for invalidating it. *Cutter*, 349 F.3d at 265. They reason that giving more protection than the First Amendment requires is an impermissible preference toward religious rights (not religious ideology, as though the rights themselves pose a subversive danger). *See id.* at 265–66.

A brief comparison to other instances where legislatures give more protection to rights than the Constitution requires reveals that this demonstration of bizarre territorialism by the courts is unwarranted. *Lubbock Indep. Sch. Dist. v. Lubbock Civil Liberty Union*, 680 F.2d 424 (5th Cir. 1982), held that opening school facilities to religious student groups could create the appearance of endorsement (placing state's "imprimatur upon any faith or religious practice") and therefore violated the Establishment Clause. *Lubbock Indep. Sch. Dist.*, 680 F.2d at 426 (Reavley, J., dissenting). The U.S. Congress enacted the Equal Access Act prohibiting schools from barring religious student groups from meeting on school premises. *See* 20 U.S.C. § 4071–4074 (2000). The Supreme Court found that the statute did not violate the Establishment Clause and merely extended greater speech and assembly rights than case law previously allowed. Bd. of Ed. v. Mergens, 496 U.S. 226, 250 (1990).

[162] *Cutter*, 349 F.3d at 266–67.

[163] *See supra* note 91 and accompanying text.

to avoid conflict between these competing obligations, the power of government was to be limited. At the core of Postmodern thought is the rejection of Modernity's metaphysical presuppositions, including two-kingdoms theology.[164] Since Postmodernism conceives of only a civic authority and believes that individuals create reality, it naturally expanded the role of government, which has led to greater tension between government and religion. The Postmodern ideal of rationality,[165] which emerged as the rejection of faith, values forming beliefs without the aid of tradition or what it perceives as unrealistic conceptions of absolute truth. It follows that a Postmodern Free Exercise Clause cannot protect religion without protecting other acts of conscientious belief as well.

V. TOWARD A WORKABLE RELIGION CLAUSE JURISPRUDENCE IN THE POSTMODERN AGE

The *Cutter* case is representative of the serious implications of a Postmodern Religion Clause jurisprudence. Courts are increasingly likely to adopt the reasoning of the *Cutter* court as Postmodernism displaces Modernity as the dominant American worldview, particularly when the next generation of judges takes to the bench. While the law is expected to be somewhat evolutionary, changing as society changes, the shift from Modernism to Postmodernism could usher in a potentially monumental upheaval that would far exceed the comparatively minor changes the American legal system has experienced thus far. Such a change would affect not only the substance of the law, but also the very foundation upon which our system is built. Nowhere would the impact of this upheaval be felt more acutely than in the treatment of the religion clauses.

There are peculiar dangers in adopting a Postmodern Religious Clause jurisprudence. Primarily, as should be evident at this point in the discussion, Postmodern philosophy is intellectually divorced from the underlying purpose of the Religion Clauses. As a result, not only will the doctrines surrounding the Religion Clauses become even more of an incoherent and unpredictable mess,[166] the interpretation of the text will stray further away from the fair import of the constitutional language.[167] Inherent in this problem is the fact that Postmodernism, despite its preference for rational over traditional beliefs, is not

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[164] *See supra* notes 102–111 and accompanying text.

[165] *See supra* note 112 and accompanying text.

[166] For criticism of the treatment of religious issues generally and the *Lemon* test in particular, see *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (criticizing the checkered past of the Court creating tests out of "historically faulty doctrine") (citation omitted).

[167] This line of reasoning is different from original intent arguments. The point is not that the religion clauses are being interpreted in a manner that the Framers did not intend, although that is possible, but rather that the interpretation is fundamentally incompatible with the justifications for the Religion Clauses.

religiously neutral.[168] While Modernity framed the debate concerning the legal treatment of religion at the founding, it did so explicitly. Even though the Postmodern view frames the debate over legal treatment today, it does so implicitly and asserts that Modern understanding is an anathema in the realm of public discourse.[169] This is a crucial point because Postmodernism, as applied to the Religion Clauses, has demoted the first freedom guaranteed in the Constitution, the fundamental right to free exercise, to an ancillary right, only having effect if exercised with another apparently more fundamental right. As such, vigorous debate regarding the merits and implications of these competing world views needs to be articulated and a conscious choice between them must be made, and any changes need to come through the constitutional process instead of through judicial fiat.

Until a principled decision is reached to change the meaning of the First Amendment, it is incumbent upon the courts to promote a coherent treatment of the Free Exercise and Establishment Clauses, which can only be achieved by adhering to a Modern religion clause jurisprudence. I propose four guidelines that will ensure a coherent and workable religion clause jurisprudence in the Postmodern age.

First, in order for the promise of free exercise to be meaningful, it must be treated as meritorious of unique protection from state interference. This would require that *Smith* be reversed, or at least limited in scope. The *Smith* Court overzealously championed the rule of law and lost sight of the importance of fundamental rights. The unique vulnerability of religion is evident in the fact that its protection has been relegated to the majoritarian process. This is not only the opposite of what the Framers intended,[170] it is completely incompatible with the philosophical foundations upon which the religion clauses are built. The return to strict scrutiny or even intermediate scrutiny would not result in anarchy as the *Smith* Court feared, as long as courts interpret compelling state interest through a Modern lens, which would allow infringement on free exercise only in instances in which infringement was absolutely necessary to promote public peace and safety. Under the "peace and safety" rationale, the reasonable basis scrutiny of *Smith* could be limited to the criminal context and then perhaps only for more

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[168] The shift to Postmodern ideals is "both obscured and exacerbated by the pretense that it is merely being 'neutral' among competing conceptions of the good life. Somehow, 'neutral' came to mean 'secular' — as if agnosticism about the theistic foundations of the universe were common ground among believers and nonbelievers alike." McConnell, *supra* note 66, at 174.

[169] *See* NEUHAUS, *supra* note 117, at 146–47 (noting that the slightest hint of religious motivation behind enacting a law, even if only a personally held religious belief, could be enough to invalidate the law completely, marginalizing rather than protecting religious individuals in the political process).

[170] *See* McConnell, *supra* note 64, at 1487–88 (noting that John Marshall and James Madison both viewed at a minimum that the press and religion were "*equally* and *completely* exempted" from the laws of Congress).

serious offenses. At the core of the Modern understanding of the Religion Clauses is the need to protect individuals from state interference or involvement in religion simply because religion is to be beyond the province of civic sovereignty. While it is hard to imagine the government shrinking back from the areas in which interference occurs to create fewer tensions between church and state, it is more than reasonable to assert that free religious exercise should have meaningful legal significance (it is, after all, a fundamental right), and reversing *Smith* would be the best, first step in that direction.

Second, the temptation to apply an absolute neutrality requirement in Establishment Clause cases must be resisted, and basic separation principles should be used in its place. By requiring absolute neutrality, courts are being co-opted for the work of chasing any reference to religion from public life.[171] In the event that *Smith* was reversed or limited, or that it was not and the legislature was the only source from which religious exemption or accommodation could be obtained, an Establishment Clause that demanded absolute neutrality would take away the right to free religious exercise with the left hand after having secured it with the right. Separation of church and state is inherently consistent with free exercise principles. Absolute neutrality is not, as it will always favor non-religious expression over religious expression. That is not to say that neutrality cannot be a useful tool in Establishment Clause jurisprudence, only that it cannot be used tyrannically. Courts using substantive or benevolent neutrality to guide the separation principles of establishment would create a reasonable and logically consistent Modern approach to the Religion Clauses which could all be done within the context of the original incarnation of the *Lemon* test.[172]

Third, because of the uniquely vulnerable position of religious entities, equal protection should be applied as between religious claimants of all different religions. The critique, originating in Postmodern thought, that the Religion Clauses when applied through the Modern lens favor traditional religions over less traditional forms of religious expression can be remedied by applying equal protection. Indeed, the *Smith* Court even suggested that religious exercise was more worthy of protection if coupled with another fundamental right.[173] While free exercise should not only be protected when exercised with another right, it does suggest that a combined free exercise and equal protection claim should cause a court to look with higher scrutiny upon government action that inhibits

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[171] "The free exercise of religion becomes the legally protected right of the dissident to freedom from religion's exercise." NEUHAUS, *supra* note 117, at 147. This same critique was leveled against the Ninth Circuit for deciding that a school's policy of voluntary recital of the Pledge of Allegiance violated the Establishment Clause. *See* Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002).

[172] For a discussion of the implications of adhering to either separation or neutrality as the guiding Establishment Clause principles, see Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071 (2002).

[173] *Smith*, 494 U.S. at 881.

the free exercise of minority religion. By extending equal protection to religious exercise, the law is being responsive to the impulse felt in the Postmodern age that the religion clauses unfairly benefit Judeo-Christian religion. In application, the state would need either a compelling or intermediate interest to infringe on free exercise, but in cases involving minority religions, the presumption against the governmental action would become stronger if an adherent to a majority religion had successfully asserted a similar free exercise claim. By linking free exercise with equal protection, vibrant protection is ensured for even minority religious adherents.

Fourth, the temptation to extend either free exercise protection or religious equal protection to non-religious entities must be resisted. Religious protection is a right in America because of the Modern understanding that civic authority had to respect the duty its citizens owed to a higher power. To be consistent with Modern thought, all non-religiously motivated conduct is the province of the state. As such, there is no secular equivalent to religious free exercise, and therefore there is no justification for extending free exercise principles and religious equal protection to secularly derived rights of conscience. This does not implicate favoritism or discrimination. Free religious exercise is a right available to all people; whether individuals make use of that right is not a concern of the states. To treat individuals fairly, the state must only ensure that this right is protected for all who would choose to exercise it. Arguably, the Free Exercise Clause compensates the religious individual since the Establishment Clause limits in some ways their full participation in civic life. To be a coherent system, the Religion Clauses must not be applied to secular acts of conscience. Indeed, following these four guidelines would ensure a Religion Clause jurisprudence that is workable, coherent, and even compatible with the original justifications that gave rise to the Free Exercise and Establishment Clauses.

VI. CONCLUSION

By equalizing the sacred and the secular, *Highway 61 Revisited*, represents religious understanding in the Postmodern age. The question that the American legal system must address is whether it should get on that highway. By understanding the effect of competing principles of Modernism and Postmodernism on the Religion Clauses, the legal system can either more fully protect the rights as intended, or articulate a reason that free exercise should not be a fundamental right to the exclusion of rights of conscience. Such an important and drastic shift should be left neither to an uncritical acceptance of the spirit of the age, nor to a well-intentioned judiciary that ultimately limits the freedoms it was supposed to preserve.